DEPARTMENT OF STATE

Washington, D.C. 20520

June 13, 1975

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MEMORANDUM TO: D/LOS - Mr. Moore

FROM: OES/OFA - Thomas A. Clingan, Jr.

SUBJECT: Ten-day Papers

Attached are preliminary analyses of the subject texts on pollution and marine scientific research prepared by Terry Leitzell and Norm Wulf.

I believe the two papers sufficiently address the difficulties inherent in the single text in their respective areas, but I would like to emphasize my own personal conviction that the single text in Committee III is structurally a sound basis for further negotiations. Norm raised an important issue, however, with regard to scientific research and the concept used in the single text to solve the problem. I believe the U.S. Government must take a policy decision on this matter at an early time.

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Preliminary Analysis of Informal Single Negotiating Text on Marine Scientific Research

Unlike many other issues, the single text deals not only with important questions of detail but also selects among competing concepts. Substantively, to accept the concept utilized in the text is to abandon our own. Tactically, if it is decided the text represents the only realistically attainable approach, supporting it by proferring amendments could result in its rejection by others in favor of an even less desirable approach.

The single text broadly defines scientific research to include virtually all research activities. In the economic zone, it requires consent for research related to resources and fulfillment of a series of obligations for research which is fundamental. Thus, all research in the economic zone is either subject to consent or obligations. The U.S. proposal does not apply to all research but through subtle drafting seeks to limit the obligation regime to resource-related research. Our draft articles are silent on the regime applicable to non-resource related research but the assumption was that it could be conducted as a high seas freedom. The four trends produced in Caracas and L. 19 introduced by the Netherlands and others also sought to exclude a portion of marine research in the economic zone from the requirement of complying with a series of obligations.

Therefore, a major question to be addressed is whether we should continue to seek exclusion of certain research in the economic zone from any regulation. NSDM ____ is instructive in this regard and provides in part: "we will not reveal the motivation for the proposal and, in the event of substantial pressure that threatens our military or general scientific research proposals, we will not press this result." If it is concluded that we should continue to seek an exclusion, the issue then arises as to how this result can be obtained.

Scientific Research in the Economic Zone and on the Continental Shelf

Prior to an examination of the regime envisaged in the negotiating text, it should be noted that research on the continental shelf is treated precisely the same as research in the economic zone in the single text. We have not formulated an explicit position with respect to research on the margin beyond the economic zone but we now need to do so. Also, the treatment of shelf research lacks precision as to what is shelf research and where it is undertaken.

The basic approach set forth in the single text requires first advance notification to the coastal state of the details of the research project (Article 15). In addition to advance notification, a series of obligations -- participation, sharing of data and samples, assistance in interpretation, etc. -- must be complied with (Article 16). No

other requirements need be met if the research is fundamental; however, if the research is related to the resources of the economic zone or the shelf, consent must be obtained and other obligations must be fulfilled (Article 21). In notifying the coastal state of the research project, a statement shall be included stating whether the project is fundamental or related to resources (Article 18). If the coastal state believes the research is not fundamental, it may object only on the ground that the research would infringe on its right as defined in the Convention over the natural resources of the economic zone, or continental shelf (Article 19). Any dispute regarding the nature of the research shall be settled in accordance with procedures set forth elsewhere in the Convention (Article 20). When research is fundamental, the coastal state shall indicate its desired participation within _____ days of the communication, and when it fails to reply the research may be conducted subject to satisfaction of the other obligations (Article 22). If the research is related to resources, consent must be obtained and no publication of research results without the consent of the coastal state may occur.

The difficulty this regime creates is that basically all of fundamental research results can, if interpreted for that purpose, provide some information about resources. Therefore, virtually all research can be construed as "related to resources" and subject

to coastal state consent.

Our proposal had contemplated that exploration and exploitation of resources would be subject to coastal state consent. To distinguish between exploration and research under our proposal, projects which complied with the obligations would be presumed to be scientific research. The major difficulty with this approach is that some of the obligations could not be fulfilled until long after the research had taken place -- publication of research results, for example, generally occurs at least a year after the project and often times even later than that. To partially meet this problem as well as to solve other problems, our instructions contemplated as a fallback a veto based on non-fulfillment of obligations subject to compulsory dispute settlement. The single text, however, goes beyond subjecting exploration and exploitation to consent by including all research related to resources. While incorporating a veto arrangement, this veto is based on this fundamental/resource-related distinction which is not as objective a criteria as fulfillment of obligations. Because the criteria is neither objective nor distinct, the provision in the single text providing for settlement of disputes in accordance with the procedures set out in the relevant articles of the Convention provide far less comfort than that envisaged under our veto fallback.

Some comfort may be drawn from paragraph 2 of Article 18 which calls upon states to promote the establishment of guidelines concerning the differentiation between research directly related to the exploration and exploitation of resources and fundamental research which is not directly related to the exploration and exploitation of resources. If these phrases actually are meant to define the two forms of research, then the scope of the research subject to a consent regime has been somewhat limited. Absent at least such a definition or limitation, it seems unlikely that any scientist or government official could state in a notification for most research projects that the research is unrelated to resources with the consequence that most research would be subject to a consent regime.

Assuming proper limits could be placed upon research subject to a consent regime, the researcher could notify the coastal state that the research is fundamental and conduct the research unless the coastal state objects. The objection could only be based upon a coastal state assertion that its rights over natural resources in the zone or on the shelf would be infringed. Article 45 of the Committee II text gives the coastal sovereign rights over natural resources for the purpose of exploring and exploiting, conserving and managing. One could argue that the major technique for conserving and managing resources is to control exploitation and, therefore, the grounds for objection are fundamentally the same as the possible definition set

forth in paragraph 2 of Article 18. On the other hand, it can be asserted that the basis for objection set forth in Article 19 provides the definition of fundamental and related to resources.

No matter how this is clarified the regime could not be considered acceptable unless there is a stated time period in which the coastal state must object. Otherwise, an objection could lawfully be exercised as the research vessel approaches the economic zone to conduct the research.

In sum, this approach clearly is unacceptable in its present form but could be made more acceptable with two primary changes:

a. The research subject to consent is substantially narrowed and more clearly defined;

b. A researcher who has submitted a notification may conduct his research if he receives no objection from the coastal state within a stated time period.

International Area.

Article 25 provides that all states have the right to conduct research in the International Area but requires prior notification be given to the International Authority and suggests a requirement of open publication. Although better than the Committee I text, it is nonetheless unacceptable. Also unacceptable is the provision for "protective jurisdiction" accorded to the coastal state when research is conducted in portions of the International Area immediately adjacent to the economic zone or continental shelf of the coastal state.

TO: D/LOS - John Norton Moore

THROUGH: OES - T. A. Clingan

FROM: L/OES - TLLeitzell

SUBJECT: Marine Pollution Single Negotiating Text - Critical and Serious Issues

I. INTRODUCTION

This paper sets out a series of critical issues in the single text which require amendments if the text is to be acceptable to the United States. In addition, I have noted, with less detailed discussion, a number of other issues which need attention and on which amendments may be required. I have consulted with a number of other individuals on the Task Force on a personal basis. However, the opinions expressed herein represent only my personal views. The order of their presentation is not intended to indicate any rank ordering of priority. As a preliminary comment, I would note that the structure of the text is workable and that we could achieve our objectives by amending and working with this text.

II. CRITICAL ISSUES

A. Vessel Pollution in the Territorial Sea

(Ref:Articles 20(3), 28 (1), (5), (8) of the pollution text and Article 8 (1) (2) of the innocent passage text).

Existing U.S. statutes including the Port and Waterways Safety Act and the Federal Water Pollution Control Act provide for vessel pollution control regulations in the U.S. territorial sea. The retention of the existing U.S. right to establish such regulations, subject to the right of innocent

passage is considered critical

failure to retain the right could produce a number of votes against the advice and consent. Existing instructions provide for the retention of the right. Article 20 of the pollution text is internally inconsistent (due to a typing error, we are told) and must be amended to clearly indicate the right of the coastal state to legislate regulations for the territorial sea more stringent than those agreed internationally. The requirement not to hamper innocent passage must, of course, be retained. In addition, Article 18(2) of the section on innocent passage must be deleted since it would virtually eliminate any right to establish such higher regulations. In connection with that issue, we should examine the implications of Article 16-2(h) which would violate a vessel's right of innocent passage by a wilfull pollution violation, although this point is not as serious a problem as the others above.

The territorial sea enforcement article, Article 28(1), must clearly provide an enforcement right for all of the regulations prescribed internationally or by the coastal State which are applicable in the territorial sea. The article as presently drafted is unclear and a simple cross-reference to the regulation-setting article would be sufficient. Also, Article 28(5) and (8) provide for a complete flag state right to pre-empt any coastal state prosecution for violations in the territorial sea and both paragraphs must be deleted.

The coastal State rights in the territorial sea along with the right to establish higher regulations in ports are clearly the most important issues for environmentally-

concerned Senators and failure to retain these rights could endanger the obtaining of Senate advice and consent.

B. Coastal State Standard-Setting Rights in Areas Beyond the Territorial Sea

(Ref: Article 20(4) (5) and (6)).

Paragraph 5 of Article 20, at least by implication, recognizes the right desired by Canada for the coastal State to establish more stringent regulations in "vulnerable areas" with no international review process and with no restriction on the type or scope of the regulations except to require non-discrimination. While the paragraph does not explicitly grant such a right, the implication is strong and Canada would certainly not be reluctant to seize upon it as confirmation of its claim. Also, while there is no enforcement right specified it is likely that such a right would be assumed by Canada and, when we challenged that action, we would be embroiled in a major dispute. The article must be deleted or, at a minimum, amended to include a much more restrictive definition and an international review process for the regulations. It should be noted that no right of this nature has been supported in the Conference by the Group of 77 or by

the maritime States and was included in the text at the request of the Soviet Union.

Paragraphs 4 and 6 of Article 20 raise a related issue by implying that coastal States could establish more stringent regulations for "special areas" within the economic zone after recognition of that "special area" by the competent international organization. There would apparently be no binding international review process for such regulations nor any limitations on the type or scope of the regulations. Again, there is no enforcement right indicated but it would certainly be quickly assumed

SECRET

by any coastal State utilizing the prescriptive right. It would obviously be advantageous for the U.S. to completely eliminate any coastal State regulatory authority over vessel pollution beyond the territorial sea including discharge regulation setting. We made considerable progress in this regard during Geneva in discussions with a number of key developing countries. However, all of the private Group of 77 texts, including one dated May 6, authorize coastal States to prescribe higher discharge regulations for "special areas" approved by the competent international organization. While those texts have not been finally agreed within the Group of 77, they are indicative of some support for discharge regulation setting and we should carefully examine the possible necessity of instructions allowing acceptance of some limited system of coastal State discharge regulation as a fallback to achieve our other objectives in this area.

C. Port State Enforcement

(Ref: Articles 27 and 28).

Articles 27 and 28 contain several serious restrictions on the right of a port State to take enforcement action against vessels in its ports for violation of the international discharge regulations. The most serious, Article 27 (3), would allow action only for violations occurring in an unspecified area, presumably the 200-mile economic zone.

Also, Article 28(5) is a complete flag State pre-emption of any port State prosecution, requiring at least a six-months delay and complete discontinuation if the flag State completes its own proceedings regarding the same violation. Article 28(8) requires that prosecution not even be initiated if the flag State has already begun proceedings. All of these restrictions must be eliminated if we are to achieve our objective of an effective port State enforcement system. We received considerable support in Geneva for our port State enforcement proposal from developing countries, some of whom indicated that acceptance of it in the Conference would make it easier for them to possibly accept some restrictions on coastal State rights.

It should be noted that it will continue to be critical to retain the right for port States to prescribe higher regulations for vessels entering ports. Our strategy of remaining silent and avoiding acceptance of any articles with negative implications has been successful to date but we must continue to defeat or change such articles and to retain Article 22(2) of the innocent passage text on this point.

D. Sovereign Immunity Article (Ref: Article 42)

There are two critical amendments to be made to the sovereign immunity article. First, State aircraft must be added to the article since the provisions on ocean dumping now include jurisdiction over aircraft for the purposes of regulating and enforcing against dumping. Second, the immunity clause should apply to the entire section on the marine environment and not just to the prescription and enforcement sections regarding vessel-source pollution. In addition, any articles in the Committee II text which authorize legislative or enforcement jurisdiction over vessel-source pollution should be studied to ensure that such jurisdiction is not inadvertanely applied to warships in situations not covered by the sovereign immunity clause.

SECRET

E. Ocean Dumping (Ref: Articles 19 and 25)

During the discussion of ocean dumping in the Third Committee, it was generally agreed that the definition of dumping from the London Convention of 1972 would be included in the text although there was some desire by other countries to amend it. The definition is complex and was carefully negotiated to ensure that it did not cover a wider range of activities. If it were not included, coastal States could use this jurisdiction expansively to obtain rights regarding at least certain types of vessel pollution. The definition must be included in the text.

Regarding the extent of coastal State rights, Canada and Australia argued strenuously for both regulatory and enforcement jurisdiction to the outer edge of the continental margin beyond 200 miles. The text includes their language in Article 25, the enforcement article, while there is a blank in Article 19. The dangers in extending water column jurisdiction for coastal States beyond 200 miles for pollution control are obvious and we must limit coastal State rights over dumping to the 200-mile economic zone.

F. State Obligations to Comply with International Regulations (Ref: Articles 17, 19 and 20(2) and Article 68 of the Committee II text)

A U.S. objective in the environment segment of the negotiations is to achieve a meaningful obligation for all States to comply with international regulations, i.e. the IMCO Convention regulations, on vessel-source pollution. The purposes have been to expand compliance for environmental protection reasons, bolster IMCO's role in the field and provide us with an additional substantive argument against coastal State regulation-setting in the economic zone. Our major opposition has come from the maritime States who have made juridical arguments that they do not want to undertake any such obligation in the LOS Convention. The Group of 77 appeared split on the issue although all of their drafts use strong language,

"conform to the global rules and standards", in the flag State obligation. The language of Article 20(2) is even weaker than that desired by the maritime States, and must be amended.

It should be noted, although not as critical issues, that the obligation regarding continental shelf pollution regulations in Article 17 suffers from the identical deficiency as that on vessel pollution. Although the draft of Article 68 in the Committee II text is considerably better on this point. The Article 19 obligation on international dumping regulations is acceptable and should be maintained.

G. Monitoring and Environmental Assessments

(Ref. Articles 13, 14, and 15)

Articles 13 and 15 are acceptable in and of themselves although there is a serious question as to whether Article 14 provides sufficient safeguards regarding a possible obligation to provide monitoring reports and environmental assessments to international organizations regarding military activities. This is one reason why it is critical to expand the sovereign immunity article to cover the entire environment section (see part D above). However, even with that expansion, the language of Article 14 must be carefully analyzed to determine if it provides adequate protection.

H. The Double Standard

(Ref. Articles 3, 4(1), and 1b)

There was little discussion in the Committee on the double standard issue, although private conversations gave some hope that a reasonable compromise could be reached. The language of the single text is not horrible and is better than we had expected. However, the Group of 77 may fight hard on this one and,

while it may not be critical to change the existing single text, it will be critical to avoid substantially broadening the double standard.

III. OTHER ISSUES

The following is a list of other issues in the environment single text which must be studied and analyzed. While these items vary in their degree of seriousness, none falls into the critical category. They are set out here as guidance for future work, including an article by article analysis.

A. Article 4(4). The phrase on legitimate uses could raise difficulties and should be made compatible with the Committee II text.

B. Article 17(1). This text as drafted, may omit coastal State pollution control over pipelines on the shelf and should be made compatible with Article 55 and 68 of the continental shel f text to ensure that pipelines are covered and subject to the obligation on international regulations.

C. Article 21 on standards for atmospheric pollution. This text was cut from whole cloth and needs work if it is to be included at all. In particular, there are no jurisdictional limits.

D. Article 22 on enforcement for land-based pollution. Again from whole cloth and too broad.

E. Article 23 on enforcement on the continental shelf. This article is necessary but should be tied directly to the regulation-setting article.

F. Article 24 on deep seabeds enforcement. A cross-reference to the deep seabeds section is all that is required since this issue has not been negotiated in Committee III.

G. Article 25 on dumping enforcement. This article needs some minor work in addition to the critical

to that in the London Dumping Convention.

H. Article 27 on port state enforcement. In addition to the critical changes, the investigation should be obligatory if requested by another State and para. 2 should require withholding permission to sail.

I. Article 28 on enforcement. The "party" requirement should be deleted in paragraph 2 and paragraph 9 should not apply to violations in the territorial sea.

J. Article 29 on release. This should apply to Article 28 as well as 27.

K. Article 37 on liability. This should provide State liability rather than simply access to courts.

L. Article 40 on enforcement for atmospheric pollution. Silly, too broad, and unnecessary.

M. Article 41 on responsibility and liability. The liability language needs study and we should add the requirement on access to domestic courts.